

Real Estate Leasing: Illinois

EUGENE J.M. LEONE, SCOTT A. SCHONFELD, AND SINDHOORI NACKEERAN, PIRCHER, NICHOLS & MEEKS,
WITH PRACTICAL LAW REAL ESTATE

A Q&A guide to commercial real estate leasing law for landlords and tenants in Illinois. This Q&A addresses state laws and customs that impact commercial leasing, including the execution and enforceability of leases, disclosures, transfer taxes, rents and security deposits, permitted assignments, financings, and remedies. Federal, local, or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see Real Estate Leasing: State Q&A Tool (<http://us.practicallaw.com/1-517-4023>)).

EXECUTION AND ENFORCEABILITY

1. Describe any formal requirements for the execution of a lease. In particular specify if:

- Witnesses are required.
- Acknowledgments are necessary.
- Counterpart signatures are enforceable.
- There are any homestead law requirements.
- There are any other important requirements in your state.

WITNESSES

Witnesses are not required to execute a lease in Illinois.

ACKNOWLEDGMENTS

Acknowledgments are not required to execute a lease in Illinois.

COUNTERPART SIGNATURES

Leases executed in counterparts are enforceable in Illinois.

HOMESTEAD LAWS

There are no homestead laws applicable to the execution of a lease.

OTHER REQUIREMENTS

There are no other statutory requirements to execute a lease.

2. Must a memorandum of lease (or any other instrument) be recorded for a lease to be enforceable against third parties? If so, must an amendment to a recorded memorandum of lease be recorded if there is a further (material or non-material) amendment to the lease?

A memorandum of lease may be recorded to provide record notice of the existence of a lease. However, a third party may be found to have constructive notice of the lease at the time of conveyance regardless of whether or not there is record notice of the lease.

However, leases that are subject to Illinois' transfer tax must be recorded (see Questions 10 and 11).

3. Provide the statutory form of acknowledgment for:

- An individual.
- A corporation.
- A limited liability company.
- A limited partnership.
- A trustee.

Chapter 5, Section 312/6-105 of the Illinois Compiled Statutes provides short statutory forms of acknowledgment. However, they are not exclusive and do not preclude the use of other forms.

INDIVIDUAL

STATE OF [STATE])

COUNTY OF [COUNTY])

This instrument was acknowledged before me on [DATE] by [SIGNATORY NAME].

[SEAL] _____

Notary Public

My Commission Expires: [DATE]

CORPORATION

STATE OF [STATE])

COUNTY OF [COUNTY])

This instrument was acknowledged before me on [DATE] by [SIGNATORY NAME] as [SIGNATORY TITLE] of [CORPORATION NAME].

[SEAL] _____
 Notary Public
 My Commission Expires: [DATE]

LIMITED LIABILITY COMPANY

STATE OF [STATE])

COUNTY OF [COUNTY])

This instrument was acknowledged before me on [DATE] by [SIGNATORY NAME] as [SIGNATORY TITLE] of [LLC NAME].

[SEAL] _____
 Notary Public
 My Commission Expires: [DATE]

LIMITED PARTNERSHIP

STATE OF [STATE])

COUNTY OF [COUNTY])

This instrument was acknowledged before me on [DATE] by [SIGNATORY NAME] as [SIGNATORY TITLE] of [LIMITED PARTNERSHIP NAME].

[SEAL] _____
 Notary Public
 My Commission Expires: [DATE]

TRUSTEE

STATE OF [STATE])

COUNTY OF [COUNTY])

This instrument was acknowledged before me on [DATE] by [SIGNATORY NAME] as [SIGNATORY TITLE] of [NAME OF ENTITY].

[SEAL] _____
 Notary Public
 My Commission Expires: [DATE]

DISCLOSURES, CERTIFICATIONS, AND IMPLIED USES

4. Are there any statutory or legal disclosures required by the landlord or the tenant either at the beginning or end of the lease term? Are there any compliance certificates the tenant may request from the landlord?

There are no statutory or legal disclosure requirements for commercial leases for either the landlord or the tenant under Illinois law.

Compliance certificates are not statutorily required.

5. Is a lease deemed to include an implied warranty of fitness for intended use?

Under Illinois law, commercial leases have no implied warranty of fitness for intended use.

Residential leases have an implied warranty of habitability (*Jack Spring, Inc. v. Little*, 280 N.E. 2d 208 (Ill. 1972)).

TERM, RENEWAL, AND EARLY TERMINATION

6. Are there any legal restrictions which:

- Limit the maximum term of a lease (including any renewals)?
- Require the landlord to allow the tenant to renew its lease?
- Allow the tenant to terminate its lease before the express expiration date?

LIMIT ON MAXIMUM TERM

There are no statutory restrictions on the maximum term of a lease in Illinois other than the common law rule against perpetuities, if applicable (765 Ill. Comp. Stat. 305/4).

TENANT RENEWAL

A landlord is not required to allow a tenant to renew its lease.

EARLY TERMINATION

Commercial tenants generally cannot terminate a lease before the stated termination date unless the lease provides otherwise.

Chicago's landlord-tenant ordinance grants residential tenants the right to terminate a lease if the landlord does not cure certain breaches specified by the ordinance within a prescribed cure period (see City of Chicago: Rents Right; City of Chicago Residential Landlord and Tenant Ordinance Summary).

7. Is the landlord required to provide the tenant with a notice before the effective date of a renewal when the lease term automatically renews?

For commercial leases with automatic renewal provisions, the landlord must provide written notice to a tenant no less than 30 days and no more than 60 days before the cancellation deadline (815 Ill. Comp. Stat. 601/10). However, the enforceability of automatic lease renewal clauses varies by locality.

RENTS AND SECURITY DEPOSITS

8. Are there any legal restrictions on:

- How much rent the landlord may charge?
- Whether certain operating expenses (or other additional rent) may be passed through to the tenant?

MAXIMUM RENT

There are no legal restrictions on the amount of rent a landlord may charge in a commercial lease. The Illinois Rent Control Preemption Act prohibits municipalities from restricting the amounts landlords can charge as rent (50 Ill. Comp. Stat. 825/5(a)).

OPERATING EXPENSES

There are no restrictions on the amount of operating expenses that may be passed through to the tenant.

9. For security deposits:

- Must the landlord maintain security deposits in a separate bank account for each tenant?
- Must a security deposit be in an interest bearing account?
- Must the landlord pay all interest earned to the tenant or can the landlord retain a percentage of the interest earned as an administrative fee?

COMMINGLING PERMITTED

In Illinois there are no statutory regulations or requirements for security deposits for non-residential leases. However, residential landlords in Chicago cannot commingle security deposits with other assets (see City of Chicago: Rents Right; City of Chicago Residential Landlord and Tenant Ordinance Summary).

INTEREST BEARING ACCOUNT

Commercial landlords do not have to hold security deposits in an interest bearing account.

The Illinois Security Deposit Interest Act requires residential landlords of real property containing 25 or more units in either a single building or a contiguous complex of buildings to pay interest to the tenant on a security deposit held for more than six months (765 Ill. Comp. Stat. 715/1).

Residential landlords in Chicago must also comply with the Chicago landlord-tenant ordinance (see City of Chicago: Rents Right; City of Chicago Residential Landlord and Tenant Ordinance Summary).

ADMINISTRATIVE FEES

Commercial landlords are not required to pay tenants any interest earned on security deposits.

Residential landlords of real property containing 25 or more units in either a single building or a complex of buildings must pay interest to the tenant on a security deposit held for more than six months (765 Ill. Comp. Stat. 715/1). A landlord that is required to pay interest to tenants in this situation is not entitled to retain a percentage of the

interest earned as an administrative fee (*Haywood v. Superior Bank*, 614 N.E. 2d 461 (Ill. App. Ct. 1993)).

TRANSFER TAXES AND OTHER TAXES

10. Are any state or local transfer taxes triggered when a lease is signed or in the later assignment of a lease? If so, please specify the:

- Rate for the tax and how is it calculated.
- Returns required.
- Timing for filing the returns and paying the taxes.

RATE AND CALCULATION

Transfer taxes are imposed on the transfer of ground leases that provide for a term of 30 or more years, when all options to renew or extend are included (35 Ill. Comp. Stat. 200/31-5 and 200/31-10). The Illinois Department of Revenue holds that the transfer tax does not apply to the issuance or creation of ground leases (Illinois Department of Revenue: Real Estate Transfer Tax).

Transfer taxes are \$0.50 for each \$500 of value or fraction of it. Counties and municipalities impose transfer taxes at different rates. (35 Ill. Comp. Stat. 200/31-10 and 200/31-65.)

RETURNS

Transferred leases subject to transfer taxes must be recorded and declared. Transfer tax declarations must be filed with the county recorder when the lease is recorded or within three business days after the transfer is effected, whichever is earlier (35 Ill. Comp. Stat. 200/31-25). Transfer tax declarations are prescribed by the state, county, and municipality.

The transfer tax declaration form for the state is available on the Illinois Department of Revenue's website.

Counsel should check counties' and municipalities' websites for their transfer tax declaration forms.

TIMING

The county recorder collects transfer taxes through the sale of revenue stamps (35 Ill. Comp. Stat. 200/31-15). The county recorder will record a ground lease (or memorandum of the ground lease) that is subject to transfer taxes only if the proper stamps are affixed to it (35 Ill. Comp. Stat. 200/31-20).

The Illinois Department of Revenue conducts random investigations into unpaid taxes and the county's State's Attorney may prosecute and collect them (35 Ill. Comp. Stat. 200/31-60).

11. Are state or local transfer taxes triggered when the tenant undergoes a (direct or indirect) transfer of its ownership interests? In particular, please specify the:

- Percentage of ownership interest that triggers the taxes.
- Rate for the taxes and how they are calculated.
- Returns required.
- Timing for filing the returns and paying the taxes.

PERCENTAGE OF INTERESTS

Transfer taxes are triggered by the transfer of:

- More than a 50% ownership interest (controlling interest) in a real estate entity.
- A beneficial interest in real property.

(35 Ill. Comp. Stat. 200/31-5 and 200/31-10.)

Beneficial interests include, but are not limited to:

- The lessee interest in a ground lease that provides for a term of 30 or more years, when all options to renew or extend are included.
- The indirect interest in real property through a controlling interest in a real estate entity.

(35 Ill. Comp. Stat. 200/31-5.)

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The Illinois Department of Revenue conducts random investigations into unpaid taxes and the county's State's Attorney may prosecute and collect them.

12. Describe any state or local taxes (rental or other) that the landlord must collect from the tenant.

The landlord is not required to collect state or local taxes from tenants.

ASSIGNMENT, FINANCING, AND TRANSFERS

13. Describe any laws allowing the tenant to assign its lease, or sublease its premises, without the landlord's consent. Is a reasonableness standard implied when the lease is silent on whether the landlord's consent to an assignment or sublease may be reasonably or unreasonably withheld?

Illinois Appellate Courts have held:

- A tenant generally has the right to assign the lease without the landlord's consent if the lease is silent about assignments (*Cole v. Ignatius*, 448 N.E. 2d 538, 541 (Ill. App. Ct. 1983)).
- If a lease forbids any sublease or assignment without the landlord's consent, the landlord cannot unreasonably withhold its consent to a sublease regardless of the terms of the lease (*Golf Mgmt. Co., v. Evening Tides Waterbeds, Inc.*, 572 N.E. 2d 1000, 1003 (Ill. App. Ct. 1991)).

The Illinois Supreme Court has not addressed this subject.

14. If the lease does not expressly define the term "assignment" and there is no other express restriction in the lease to the contrary can the:

- Tenant's corporate ownership interests be freely transferred without the landlord's consent?
- Tenant freely place a lien on its leasehold interest, or pledge its corporate ownership interests, in connection with a financing without the landlord's consent?

TRANSFER OF OWNERSHIP INTERESTS

An Illinois Appellate Court has held that a transfer of a tenant's corporate ownership interests without the landlord's consent does not violate a clause prohibiting assignment (*Associated Cotton Shops, Inc. v. Evergreen Park Shopping Plaza of Delaware, Inc.*, 170 N.E. 2d 35, 38-9 (Ill. App. Ct. 1960)).

SECURITY LIEN OR PLEDGE OF OWNERSHIP INTERESTS

A tenant can place a lien on its leasehold interest without violating a clause prohibiting assignment (*M. Ecker & Co. v. LaSalle Nat'l Bank*, 645 N.E.2d 335, 339-40 (Ill. App. Ct. 1994)).

15. When a lease requires a landlord's consent for an assignment and defines the term "assignment" to include a transfer of the tenant's corporate ownership interests, would an indirect transfer of the tenant's interests trigger the landlord's consent requirement?

A lease should specify whether the indirect transfer of a tenant's ownership interests requires the landlord's consent.

16. Is the tenant/assignor deemed released from future liability under the lease when the lease is silent on whether the original tenant will be released in the event of an assignment?

In Illinois, the tenant or assignor is not released from future liability under a lease in the event of an assignment, absent a provision stating otherwise.

17. Describe any restrictions on the landlord's ability to transfer the real property subject to the lease. Does this transfer affect the tenant's rights or obligations?

In Illinois, there are no statutory restrictions on the landlord's ability to transfer real property subject to the lease. If the landlord transfers its interest in the real property, the tenant's rights and obligations remain the same unless the lease provides otherwise.

REMEDIES

18. If a tenant breaches the lease:

- Are there any implied remedies available to the landlord, such as the acceleration of rent?
- Is there a limitation on the landlord's ability to exercise self-help?
- Is there a common form of an eviction proceeding and, if so, what is the typical length of time for the proceeding?
- Are there specific mechanisms for expedited remedies, such as waiver of jury trial or arbitration?
- Is the landlord required to mitigate its damages without an express obligation to do so?

IMPLIED REMEDIES

The Forcible Entry and Detainer Act provides the sole means for settling a dispute over possession rights to real property (735 Ill. Comp. Stat. 5/9-101 to 5/9-321; *Fortech, L.L.C. v. R.W. Dunteman Co.*, 852 N.E. 2d 451, 459 (Ill. App. Ct. 2006)). When a tenant fails to pay rent, a landlord may:

- Terminate the lease and sue for possession, after providing the tenant a written demand for payment and notice that the landlord will exercise that option unless payment is made within five days of the notice (735 Ill. Comp. Stat. 5/9-209; see Eviction Proceeding).
- Sue for recovery of rent (735 Ill. Comp. Stat. 5/9-201).
- File a distress warrant, to seize the tenant's personal property for rent due (735 Ill. Comp. Stat. 5/9-301 and 5/9-302).

SELF-HELP

Landlords do not have any self-help remedies in Illinois (735 Ill. Comp. Stat. 5/9-101; *Fortech*, 852 N.E. 2d at 459).

EVICITION PROCEEDING

A tenant may be evicted either by:

- Ejectment (a traditional civil action) (735 Ill. Comp. Stat. 5/6-101 to 5/6-150).
- Forcible entry and detainer (735 Ill. Comp. Stat. 5/9-101 to 5/9-121).

The landlord begins the forcible entry and detainer process by serving a tenant with a demand and notice (735 Ill. Comp. Stat. 5/9-102(a) (5), 5/9-104 and 5/9-209; see Implied Remedies). Once the time stated for compliance has passed, the landlord may file a complaint with the circuit court where the premises are situated, stating that:

- The landlord is entitled to the possession of the premises.
- The tenant is unlawfully withholding possession from the landlord. (735 Ill. Comp. Stat. 5/9-106.)

The landlord must prove its allegations by a preponderance of the evidence (735 Ill. Comp. Stat. 5/9-109.5). If the landlord is successful, the court will issue to the landlord an order of possession that requires the tenant to vacate the premises. If the tenant fails to vacate within the period specified in the order, the landlord may provide the order to the sheriff's office for the county where the property is located to have the tenant physically removed from the premises.

EXPEDITED REMEDIES

Landlords and tenants may do either of the following, or both:

- Waive their right to a jury trial (735 Ill. Comp. Stat. 5/9-108).
- Agree to resolve disputes through arbitration.

MITIGATION OF DAMAGES

The landlord must take reasonable measures to mitigate the damages recoverable against a defaulting tenant (735 Ill. Comp. Stat. 5/9-213.1).

AUTOMATIC TERMINATION OF A LEASE IN A FORECLOSURE ACTION

19. When a landlord's lender forecloses on its lien recorded against the landlord's property, would the lease interest that is subordinated to the lender's lien automatically terminate? If so, how do the parties avoid automatic termination of subordinated lease interests?

Under Illinois law, leaseholder interests that are junior to a mortgage will be terminated by judicial order if the leaseholder is specifically named in a foreclosure proceeding (735 Ill. Comp. Stat. 5/15-1404 to 5/15-1503). However, Illinois law is unclear regarding the treatment of leaseholder interests that are junior to a mortgage when the leaseholder is not named in a foreclosure proceeding.

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